IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 405

ROBERT L. BARBEE, *Petitioner,*

v.

CAPITAL AIRLINES, INC., *Respondent.*

Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Capital Airlines, Inc.[1] hereby opposes the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on August 2, 1951.

OPINIONS BELOW.

The summary judgment of the District Court for the District of Columbia (R. 23) was not accompanied by an opin-

---

[1] Capital Airlines, Inc. will be referred to as "Capital" or "Capital Airlines."

ion. The opinion of the Court of Appeals sustaining the decision of the District Court (R. 25-30) is reported at 191 F. 2d 507.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 2, 1951 (R. 31). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Whether the Court of Appeals properly ruled (R. 28) that the petitioner "did not leave a position of employment in order to perform military service" and therefore was not entitled to reemployment benefits under the Selective Training and Service Act of 1940, as amended.

2. Whether the ruling of the Court of Appeals is in conflict with this Court's decision in *Fishgold* v. *Sullivan Drydock & Repair,* 328 U. S. 275.

STATUTE AND CONTRACT INVOLVED.

The pertinent portions of the statute involved and the pertinent provisions of the collective bargaining agreement between Capital and the Air Line Pilots Association are set forth at Appendix A and Appendix B of the Petition.

STATEMENT.

On July 15, 1946, petitioner Barbee was first employed as a probationary co-pilot by respondent Capital Airlines (R. 8, 16). On January 6, 1947, after less than six months' employment, petitioner was released from the service of Capital Airlines due to a reduction in force in conformity with the provisions of section 27 (a) of the collective bargaining agreement between Capital and its pilot employees (R. 8, 16). Furthermore, Capital advised petitioner that the date of any possible recall to Capital was indefinite (R. 8). It

is undisputed in this proceeding that petitioner was released from the service of Capital under section 27 (a) of the labor agreement (R. 28 and Petition, p. 4).

On March 19, 1947, two and one-half months after his release by Capital, petitioner entered the United States Air Force. While in the Air Force, petitioner attempted to gain permanent status therein by applying for a regular commission. Unsuccessful in this attempt, he was discharged from the Air Force on February 6, 1950, after nearly three years of service. (R. 8, 16).

Petitioner on February 8, 1950, applied to Capital to be reemployed in his former position as a co-pilot, requesting that he be accorded the same seniority standing he had previously held at the time of his release from the service of Capital on January 6, 1947 (R. 12). In other words, petitioner claims that he should have been permitted to accrue seniority with Capital during the entire time that he was serving with the Air Force. Capital refused and has continued to refuse to reemploy petitioner at this advanced seniority status on the ground that he is not so entitled, either by the provisions of Capital's labor agreement with the pilots or by any veteran's privileges accorded by the Selective Training and Service Act of 1940 as amended.

Upon Capital's refusal to rehire petitioner at this advanced seniority rating, petitioner filed the present action, seeking to compel Capital to reemploy him with the full seniority to which petitioner claims he is entitled (R. 7). Pending the disposition of his suit, petitioner moved the trial court for a preliminary injunction ordering Capital to rehire petitioner as a co-pilot with seniority as of the date of the preliminary injunction (R. 7). Capital opposed that motion, and after submission of affidavits and opposing points and authorities by both parties, a hearing on the motion was held before the trial court on June 27, 1950 (R. 1). Thereupon, the trial court issued an order finding, among other things, that petitioner had not left the service

of Capital to enter the armed services, and was therefore not entitled to reemployment pursuant to the Selective Training and Service Act. The trial court further found that petitioner would suffer no irreparable injury through denial of the motion. Accordingly, petitioner's motion for a preliminary injunction pending trial was denied (R. 16). Capital then filed its answer (R. 14).

Thereafter, Capital filed a motion for summary judgment on its behalf (R. 19). In support of its motion for summary judgment, Capital Airlines urged, among other things, that since petitioner had been released from Capital's employment pursuant to section 27(a) of the collective bargaining agreement, petitioner had no reemployment rights under the Selective Training and Service Act (R. 5). The Court of Appeals for the District of Columbia had expressly so held, with respect to the same section of the same agreement, in *Edwards and Young* v. *Capital Airlines, Inc.*, 176 F. 2d 755, Cert. denied 338 U. S. 885. The trial court found "that there is no genuine issue as to any material fact and that the defendant Capital Airlines, Inc. is entitled to a judgment as a matter of law, upon the basis of *Edwards and Young* v. *Capital Airlines Inc.*, 84 App. D. C. 346, 176 F. 2d 755." (R. 23).

On appeal, the court below held "that the status of a pilot released due to a reduction in force under Section 27(a) of the collective bargaining agreement is one of unemployment" and "since the appellant (petitioner here) did not leave a position of employment to perform military service," he has no reemployment rights under the Selective Training and Service Act of 1940 as amended (R. 28-29). Accordingly, the judgment of the trial court was affirmed.

REASONS FOR THE DENIAL OF THE PETITION FOR CERTIORARI.

A. The Case is Limited to Its Particular Facts. It Does Not Present an Important Question of General Application.

The opinion below resolves the narrow question of the legal status of a pilot employee of Capital Airlines who has been released from employment under a specific provision of the collective bargaining agreement between Capital and its pilot employees. This collective bargaining agreement controls the employer-employee relationships of Capital and its pilot employees alone; it is not an agreement of general application. As a consequence, the limited holding of the court below as to these particular facts presents no question of general application which merits review by this Court.

Petitioner contends that certiorari should be granted in this case by the Court because there is presented the "question of whether Section 8 of the Selective Training and Service Act of 1940 accords reemployment rights to veterans who entered the armed services at a time when they were laid off or furloughed, due to a reduction in force . . ." (Petition, p. 6). This overamplification of the holding of the case, in an effort to secure a further review by this Court, is not in accord with the facts. The record is clear that the affirming opinion of the Court of Appeals is limited to the peculiar facts present in petitioner's case as controlled by the specific provisions of the applicable collective bargaining agreement. Contrary to the allegations of petitioner (Petition, p. 6), the opinion affects no person except those employees of Capital Airlines who may possibly be involved in the same factual situation. It is clear, therefore, that the decision below does not present any question of broad significance and is narrowly confined to special and peculiar facts.

In order for a returning veteran to be entitled to reemployment benefits under the Selective Training and Serv-

ice Act, it is mandatory that the employee shall have left a position of employment in order to perform military service. 50 U. S. C. App. 308. Petitioner's status with Capital became one of *unemployment* when he was released from Capital's service on January 6, 1947. When he entered the armed services two and one-half months later, on March 19, 1947, petitioner did *not* leave a "position in the employ" of Capital "in order to perform such training and service." Consequently, the court below properly held that petitioner has no standing to invoke the aid of the Act in securing reemployment with Capital.

The collective bargaining agreement between Capital and its pilot employees provides, among other things:

> "Sec. 27(a) A pilot who is *released* from the service of the Company due to a reduction in force and who is subsequently *reemployed* shall retain his seniority to the time of release but shall not continue to accrue seniority after release unless and until he is *reemployed*. Such pilot, if he keeps the Company advised of his address, will be *reemployed* in the order of his seniority, provided the Company finds his flying ability and physical condition still meet the required standards. The right of preference in *reemployment* shall expire at the end of one year from the date of *release*." (Emphasis added) (R. 11)

It was under this section 27(a) of the contract that petitioner was released from Capital's service on January 6, 1947 (R. 28 and Petition, p. 4).

Prior to the instant case, the Court of Appeals for the District of Columbia, in considering the effect of the same section 27(a) of the agreement, had held as a matter of law that a pilot employee released under this section does not continue in the employment of the company and therefore has no reemployment rights under the Selective Training and Service Act. *Edwards and Young* v. *Capital Airlines, Inc.*, 176 F. 2d 755, Cert. denied 338 U. S. 885. As the Court of Appeals said:

> "This Section 27(a) refers to a retention of seniority and to preference in return to the employee's service. *But, plainly, it contemplates that during the period of release from that service, the employee does not continue in the employment of the company.* The section speaks of 'reemployment.' While it speak of retaining seniority, it actually provides for a reinstatement of seniority upon reemployment. It contemplates that a pilot released due to a reduction in force might never be reemployed. Only if and when he is reemployed does he resume his seniority status. * * *
>
> "We are of the view, as we have said, that *the status of one released due to reduction in force is fixed by Section 27(a) of the contract as one of unemployment.*" (176 F. 2d at 758) (Emphasis added)

Accordingly, the court ruled that:

> "They (appellants) did not leave their employment 'in order to perform such training and service.' It is our view therefore, that the above-quoted provisions of the Selective Training and Service Act did not apply to these appellants and so the company was not required by that statute to restore them to their prior seniority status." (176 F. 2d at 757)

Similarly, petitioner was not in Capital's employ when he entered the Air Force. Therefore, the court below properly ruled that section 8 of the Selective Training and Service Act does not apply to petitioner and Capital is not required by statute to restore him to his former seniority status with the company. Petitioner's contention to the contrary (Petition p. 6) is not correct.

Petitioner incorrectly assumes that the decision will affect innumerable employees in other companies (Petition, pp. 6, 9, and 10). The ruling of the court below is specifically confined to the legal effect of a provision of Capital's own collective bargaining agreement with its pilots. The court held that the status of a pilot released from the service of Capital under section 27(a) of the labor agreement was one of unemployment (R. 28). Peti-

tioner's attempt to generalize the effect of the court's limited holding (Petition, pp. 6, 8, 9 and 10), and thereby to influence this Court in granting certiorari, is not supported by the opinion of the court below.

In furtherance of his efforts to gain a review, petitioner attempts to create the impression that the ruling of the court below will affect the rights of certain employees of the General Motors Corporation (Petition, p. 9). Such a suggestion is incorrect. It completely ignores the distinguishing features between section 27(a) of Capital's contract and the single sentence from the contract of General Motors which petitioner has quoted (Petition, p. 9). Section 27(a) of Capital's agreement repeatedly speaks in terms of "release" and possible "reemployment." The quoted sentence from the contract of General Motors merely states that "Employees will be laid off and rehired in accordance with local seniority agreement." Petitioner does not quote further from the General Motors contract, but states with unsupported generality that "under this agreement a laid-off employee retains his seniority" for a designated period of time (Petition, pp. 9, 10). Obviously, the nature of "local seniority agreements" (within the meaning of the quoted sentence) varies among the different plants of General Motors. Just as obviously, the unsupported conclusion stated by the petitioner does not express anything akin to the precise language of Capital's collective bargaining agreement.

To contend that the ruling of the court below controls the interpretation of the General Motors agreement is patently absurd. Only Capital's pilot employees are governed by the provisions of section 27(a). Petitioner's allegation that "many thousands of employees (are) covered by such seniority provisions" has nothing to support it. (Petition, p. 10).

B. The Decision Below is Not in Conflict With Any Decision of This Court.

The ruling below is consistent with the decisions of this Court. This Court has held that determinations affecting the employment rights of veterans must be consistent with and be guided by the collective bargaining process. *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521. The court below has expressly followed this principle.

In the *Aeronautical Lodge* case, *supra*, this Court said:

> "In providing that a veteran shall be restored to the position he had before he entered the military service 'without loss of seniority', § 8 of the Act uses the term 'seniority' without definition. It is thus apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining. *We must therefore look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran.*" (337 U. S. at 525)

In a like manner, in providing reemployment rights only when a person leaves "a position in the employ" of an employer, the Act uses the term "position in the employ" without definition. Here, just as in defining seniority, the courts "must look to the conventional uses in the process of collective bargaining." In the present case this can lead only to section 27(a) of the collective bargaining agreement between Capital and its pilots.

The court below, following the direction of this Court, looked to the applicable collective bargaining agreement and determined that under section 27(a) thereof petitioner did not have the status of a Capital employee upon his entry into the armed services. As a consequence, the court ruled that petitioner has no reemployment rights under the Selective Training and Service Act. This reasoning of the court below is entirely consistent with the principles expressed by this Court.

Contrary to the allegation of petitioner (Petition, p. 11), the decision below is *not* in "conflict with the rationale of the Court in *Fishgold* v. *Sullivan Drydock & Repair*, 328 U. S. 275." In that case, Fishgold had been reemployed after his return from military service. Within a year of his reemployment, it became necessary to furlough him from his work for a 9-day period because of a decrease in work of the shipyard. Non-veterans with higher seniority were not furloughed. Fishgold contended that this lay-off was a discharge within one year in violation of the Selective Training and Service Act. This Court ruled that under the particular union contract involved, Fishgold had not been discharged in violation of the Act. Instead, he had been furloughed and therefore still retained his position with the company. There is nothing inconsistent with this Court's ruling in the *Fishgold* case and the decision of the court below.

Capital has never contended that a person on furlough does not occupy a position in the employ of a company. Rather it has been the position of Capital that petitioner herein was *not* on furlough from Capital at the time of his entry into the Air Force. The Court of Appeals in the *Edwards* case, *supra*, and the court below both ruled that a person released from Captial's service under section 27(a) of the contract is no longer in a position of employment with the company. The Court of Appeals considered the effect of the *Fishgold* case in reaching its decision in the *Edwards* case. It found the two cases compatible but distinguishable (176 F. 2d at 757). The court held as a matter of law that a pilot employee released under section 27(a) of the contract is *not* on furlough within the meaning of the *Fishgold* case. The court below followed this distinction. Therefore, the *Fishgold* case is not applicable here.

In no way does the narrow holding of the court below merit review in this Court. The decision, affecting only those pilot employees of Capital similarly placed, is confined to the legal effect of a specific provision of a specific

contract. The opinion presents no question of broad significance and is entirely consistent with prior decisions of this Court.

CONCLUSION.

For the foregoing reason, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Charles H. Murchison

CHARLES H. MURCHISON,
ROBERT B. HANKINS,
MACON M. ARTHUR,
Attorneys for Respondent,
Capital Airlines.

STOCKTON, ULMER & MURCHISON,
1016 Ring Building,
Washington 6, D. C.,
Of Counsel.

December 7, 1951.